In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 255

GERHART EISLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM SUGGESTING DISMISSAL OF THE WRIT OF CERTIORARI

The Attorney General and the Solicitor General submit this memorandum for the purpose of suggesting the propriety of dismissing the writ of certiorari in this case because of the petitioner's flight from justice.

This proceeding originated with the petitioner's indictment in the United States District Court for the District of Columbia for a violation of R. S. 102 (2 U. S. C. 192). After a trial before a jury, the petitioner was found guilty and sentenced to imprisonment for one year and to pay a fine of $1,000 (R. 229). The Court of Appeals for the District of Columbia affirmed the

judgment (R. 233–245). On November 8, 1948, this Court, in the exercise of its discretion, granted a petition for a writ of certiorari (R. 253). Briefs have been filed, and argument heard by this Court on March 28, 1949, but no decision has been announced. The petitioner was at large on bail pending the decision in this case, and was also on bail pending appellate review of his conviction on another charge involving the making of false statements in connection with an application for an exit permit.[1]

On May 6, 1949, the petitioner fled the United States and has not returned to its jurisdiction.[2] On May 17, 1949, the District Court declared the petitioner's bail in both cases forfeited.

In these circumstances, it is suggested that it may be appropriate for this Court to dismiss the writ of certiorari heretofore granted. Since review on writ of certiorari is not a matter of right, but of sound judicial discretion, such a disposition is clearly within the power of the Court. Cf. *Smith* v. *United States*, 94 U. S. 97.

Dismissal of the writ in these circumstances would be in harmony with the practice of this Court and of other American courts exercising

[1] The petitioner was sentenced to imprisonment for one to three years on the latter charge.

[2] The petitioner is now being detained in Great Britain pending proceedings to secure his extradition on the other charge. Under the provisions of the Extradition Treaty of December 22, 1931, between the United States and Great Britain, the petitioner is not subject to extradition for the offense involved in the instant case. 47 Stat. 2122.

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appellate jurisdiction. Cf., e. g., *Smith* v. *United States, supra, Bonahan* v. *Nebraska,* 125 U. S. 692; *Allen* v. *Georgia,* 166 U. S. 138 (holding that the action of a state Supreme Court in dismissing a writ of error because the accused had become a fugitive from justice was not a denial of due process); *People* v. *Genet,* 59 N. Y. 80; *State* v. *Spry,* 126 W. Va. 783. See American Law Institute, Code of Criminal Procedure, Official Draft (1930) § 442 and Commentary, p. 1236. Such a disposition of the appeal of one who is a fugitive from justice is founded upon strong considerations of judicial policy. Some of these considerations were cogently summed up by this Court in *Allen* v. *Georgia, supra,* at p. 141:

> Otherwise [*i. e.,* if the writ is not dismissed] he is put in a position of saying to the court: "Sustain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial, and I will leave the State, or forever remain in hiding." We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority, to which no court is bound to submit.

In the instant case, petitioner has induced this Court to exercise its discretion, by way of writ of certiorari, to review a judgment which would otherwise have been final. Taking advantage of his freedom on bail, which was possible only

because of the additional time required for proceedings in this Court, he has fled from the country and has attempted to render nugatory any judgment that might be rendered against him. Since the writ of certiorari is issued only in the sound discretion of this Court, it would be highly appropriate for the Court, in the light of these recent events, to exercise its discretion to dismiss the writ.

Respectfully submitted.

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PHILIP B. PERLMAN,
Solicitor General.

MAY 20, 1949.

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